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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

GERLINDE KEYERLEBER,

Petitioner,

v.

CHAMPION INTERNATIONAL CORPORATION,

Respondent.

On Petition for Writ Of Certiorari to the United States Court Of Appeals For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND THE NATIONAL EMPLOYEE RIGHTS INSTITUTE IN SUPPORT OF THE PETITIONER

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MOTION OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYEE RIGHTS INSTITUTE FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 37.2 of the Rules of this Court, the Association of Trial Lawyers of America, the National Employment Lawyers Association and the National Employee Rights Institute respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the Petition for Writ of Certiorari in this case. Petitioner has granted consent to the filing of this brief. Respondent, through counsel, has denied consent.

The Association of Trial Lawyers of America is a national voluntary bar association whose approximately

50,000 members primarily represent plaintiffs in personal injury suits, tort actions, civil rights cases and employment discrimination actions. Central to ATLA's mission is the preservation of the right to trial by jury.

The National Employment Lawyers Association is a voluntary membership organization of over 3,000 lawyers who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel employees and applicants for employment on claims arising in the workplace.

The National Employee Rights Institute is a non-profit 501(c)(3) organization founded in 1993, with headquarters in Cincinnati, Ohio. NERI helps individuals understand, enforce and expand their rights in the workplace. NERI also provides information, education and assistance to employees and promotes public policies to advance their rights. It is co-publisher of the Employee Rights and Employment Policy Journal and publisher of handbooks aimed at educating employees of their rights. NERI is deeply concerned about the rights of victims of discrimination to jury trial.

The issues in this case are of great concern to ATLA, NELA, NERI, their members, and their clients. An important factor in achieving the goals of the civil rights statutes adopted by Congress and many state legislatures is the judgment of ordinary Americans, speaking as the conscience of the community against discriminatory treatment of workers. The Seventh Amendment guarantees the right to trial by jury in civil cases in federal court. That right rings hollow, however, if the courts of appeals do not vigilantly guard against encroachments by incautious or overzealous judges. Amici believe that this case presents the opportunity for this Court to halt further erosion of Seventh Amendment rights.

Amici believe their brief will assist this Court in its disposition of the Petition for Writ of Certiorari. The Court's decision concerning appellate review of grants of summary

judgment will affect numerous litigants in federal courts. In addition, nearly every state constitution explicitly guarantees the right to trial by jury, and state courts look to this Court for guidance in applying and preserving that right.

ATLA, NELA, NERI and their members have represented, counseled and educated thousands of employees across the country concerning their workplace rights. They believe this broad perspective may aid this Court in addressing the Petition for Certiorari in this case.

For these reasons, the movants respectfully request that the Court grant their motion for leave to file the accompanying brief in this case as amici curiae.

Respectfully submitted,

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September 15, 1999

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IDENTITY AND INTEREST OF AMICI CURIAE

Amici respectfully submit this brief to underscore the importance of the issue presented in the Petition: The responsibility of appellate courts to exercise effective review of summary judgments to preserve the right to trial by jury. A motion for leave to file this brief has been filed with the Clerk of this Court.[1]

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[1] Pursuant to Rule 37.6, Amici disclose that no counsel for a party authored any part of this brief, nor did any person or entity other than amici curiae, their members, or their counsel make a monetary contribution to the preparation or submission of this brief.

The Association of Trial Lawyers of America is a national voluntary bar association whose approximately 50,000 members primarily represent plaintiffs in personal injury suits, tort actions, civil rights cases and employment discrimination actions. Central to ATLA's mission is the preservation of the right to trial by jury.

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The issues in this case are of great concern to ATLA, NELA, NERI, their members, and their clients. An important factor in achieving the goals of the civil rights statutes adopted by Congress and many state legislatures is the judgment of ordinary Americans, speaking as the conscience of the community against discriminatory treatment of workers. The Seventh Amendment guarantees the right to trial by jury in civil cases in federal court. That right rings hollow, however, if the courts of appeals do not vigilantly guard against encroachments by incautious or overzealous judges. Amici believe that this case presents an opportunity for this Court to halt further erosion of Seventh Amendment rights.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS BELOW FAILED TO EXERCISE DE NOVO REVIEW OF THE SUMMARY JUDGMENT, DEPRIVING PETITIONER OF THE RIGHT TO TRIAL BY JURY GUARANTEED BY THE SEVENTH AMENDMENT.

The Questions Presented by the Petitioner focus on one of the most fundamental duties of the federal courts of appeals in the civil justice system: The constitutional command to preserve the role of the civil jury.

Even among employment discrimination cases, which tend to be fact-intensive, this case is remarkable. In an action involving a single plaintiff, some 15,000 pages of documents were produced in discovery, and 20 witnesses were deposed. In this hotly contested case, the parties' renditions of how Champion International treated Gerline Keyerleber -- and why -- differed in virtually every respect. Petitioner exercised her right to present her case to a jury. *See Taylor v. National Group of Cos., Inc.*, 605 N.E.2d 45 (Ohio 1992)(plaintiff alleging sex discrimination may demand a jury trial); *Hetzel v. Prince William County*, 523 U.S. 208 (1998)(applying Seventh Amendment right to trial by jury in employment discrimination action under Title VII of the Civil Rights Act of 1964). The district court, however, granted Champion's motion for summary judgment.

The courts of appeals, including the Sixth Circuit, have universally held that review of a grant of summary judgment is de novo; the appellate court must apply the same standard that is required of the district court.[2] That standard, this Court

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[2] *See, e.g.*, Catex Vitol Gas, Inc. v. Wolfe, 178 F.3d 572, 577 (1st Cir. 1999); Wilkinson v. Russell, 182 F.3d 89, 96 (2d Cir. 1999); Arnold M. Diamond, Inc. v. Gulf Coast Trading Co., 180 F.3d 518, 521 (3d Cir. 1999); Kubico v. Ogden Logistics Services, 181 F.3d 544, 551 (4th Cir. 1999); Lyons Partnership v. Giannoulas, 179 F.3d 384, 387 (5th Cir. 1999); DePiero v. City of Macedonia, 180 F.3d 770, 776 (6th Cir. 1999);

has cautioned, demands that judges scrupulously avoid trespassing upon the role of the jury:

> Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). *See also Hunt v. Cromartie*, 119 S. Ct. 1545, 1551-52 (1999).

In Petitioner's case, the court of appeals affirmed the grant of summary judgment in a short, unpublished opinion which did not identify the standard of review employed by the court. It is apparent, however, that the court did not examine the evidence de novo to determine whether, viewing the evidence most favorably to the plaintiff, there existed a genuine issue of material fact. Indeed, the court appears to have ignored factual disputes that were plainly presented to it.

Ms. Keyerleber's primary allegation is that when she was promoted from Safety Coordinator to Safety Manager in 1988, she was given no increase in salary grade or salary, unlike male employees promoted into manager positions. The court of appeals stated that "plaintiff has failed to prove that her actual salary was out of line with her responsibilities," that her salary was within the relevant salary range, and that a promotional increase was not required by Champion's own Salary Administration Guidelines. Pet. at A-4 to A-5.

At the outset, Amici are concerned that the court's statements may be interpreted as establishing a novel defense

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American Automotive Accessories, Inc. v. Fishman, 175 F.3d 534, 542 (7th Cir. 1999); McCaslin v. Wilkins, 183 F.3d 775, 778 (8th Cir. 1999); Interstellar Starship Services, Ltd. v. EPIX, Inc., 1999 WL 515658 at *2 (9th Cir. 1999); Smith v. Midland Brake, Inc., 180 F.3d 1154, 1159 (10th Cir. 1999); American Mfg. Mutual Ins. Co. v. Tison Hog Market, Inc., 182 F.3d 1284, 1287 (11th Cir. 1999); Carpenter v. Federal National Mortgage Ass'n, 174 F.3d 231, 236 (D.C. Cir. 1999).

to a claim of discrimination where a company complies with its own established guidelines. If, for example, a company sets a salary range for a particular level of employee at $30,000 to $50,000, it should be no defense as a matter of law that a female worker was paid $30,000 if male employees earn $50,000. To create such an affirmative defense is beyond the authority of the lower court in this diversity case governed by Ohio law. This Court should grant the Petition to require the court below to clarify the basis of its disposition.[3]

If the language is viewed as simply a factual determination that plaintiff has suffered no discrimination, amici suggest that the court of appeals failed to exercise appropriate de novo review of the evidence. The fact that plaintiff's compensation was within Guidelines is meaningful only if Champion's assignment of Salary Grade 12 to plaintiff was itself not motivated by a discriminatory purpose. On this crucial issue, however, there was sharp dispute. Plaintiff's appellate brief identified a great deal of record evidence calling defendant's motivation into question. Amici suggest that the court's appellate review did not seek to identify disputed issues of fact. Instead, the court appears

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[3] This Court faced an analogous situation in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), a products liability action for wrongful death against the manufacturer of an allegedly defective military helicopter, where the lower court rejected the affirmative "government contractor defense." Justice Scalia stated:

> It is somewhat unclear from the Court of Appeals' opinion, however, whether it was in fact deciding that no reasonable jury could, under the properly formulated defense, have found for the petitioner on the facts presented, or rather was assessing on its own whether the defense had been established. The latter, which is what petitioner asserts occurred, would be error, since whether the facts establish the conditions for the defense is a question for the jury. . . . Although it seems to us doubtful that the Court of Appeals was conducting the factual evaluation that peititoner suggests, we cannot be certain from this language, *and so we remand for clarification of this point.*

487 U.S. at 514 (emphasis added).

to have taken it upon itself to resolve those disputes in favor of the defendant.

A single example serves to illustrate this error. Champion contended that a promotional increase was unwarranted because Ms. Keyerleber's new position was not a promotion, but merely a change in job title. Champion relied heavily on an Employee Action Form prepared by plaintiff's supervisor, which included the notation "change in position title only."

Plaintiff, however, pointed out to the court of appeals, as well as to the district court, evidence from the record which undermined the weight and credibility of this document. Although other EAF's were produced in discovery, the original of plaintiff's could not be found. A copy was produced belatedly and only after a magistrate granted plaintiff's motion for an order to compel. Plaintiff testified on deposition that the entry contradicted representations made by her supervisor. The notation was inconsistent with other parts of the document. Moreover, there was direct testimony by the person who typed the form indicating that she did not type that entry and that it may have been altered or added by someone using a different typewriter. All of these factual disputes were identified for the court with extensive references to the record. Final Brief of Appellant, reproduced in Petition at E-46 to E-52.

This Court has stated that "at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson, supra,* at 249. A jury in this case would have been entitled to accord little weight or credibility to the EAF, "particularly if disbelief is accompanied by a suspicion of mendacity." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993). The court below, however, appears to have resolved this factual dispute in favor of the moving party, Champion.

In the view of Amici, the lower court's affirmance of summary judgment so clearly ignored the record evidence of factual disputes as to deprive petitioner of her constitutional right to trial by jury.

II. FAILURE OF THE COURTS OF APPEALS TO PROTECT THE JURY'S ROLE AS FACTFINDER THREATENS EROSION OF THE SEVENTH AMENDMENT JURY RIGHT.

Americans in 1787 believed that the right to trial by jury in civil cases was so fundmental that they very nearly rejected the newly-proposed Constitution. The Federalists won ratification only by agreeing to add a Bill of Rights that included an explicit guarantee of the jury right. Edith Guild Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 295-98 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L. Rev. 639, 667-730 (1973)(extensive review of ratification debates); Stephan Landsman, *The Civil Jury In America: Scenes From an Unappreciated History,* 44 Hastings L.J. 579, 599 (1993).

As Justice Story recounts:

> One of the strongest objections originally taken against the Constitution of the United States was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the seventh amendment of the Constitution proposed by Congress, and which received an assent of the people so general as to establish its importance as a fundamental guaranty of the rights and liberties of the people.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446 (1830).

Mindful of this history, this Supreme Court has consistently emphasized the responsibility of the courts to guard against any usurpation of the jury's role:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.

Dimick v. Schiedt, 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); and in *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990). Indeed, the right of jury trial in civil cases "should be jealously guarded by the courts." *Jacob v. New York*, 315 U.S. 752, 753 (1943).

The Seventh Amendment commands that in suits at common law, the right of trial by jury shall be preserved.[4] Its purpose is preservation of "the common law distinction between the province of the court and that of the jury, whereby . . . issues of law are resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

And yet, the modern Rules of Civil Procedure arm the district courts was powerful devices to resolve cases that tread very close to the boundary between the role of judge and jury. One such device is summary judgment under Rule 56, a close relative of the directed verdict. *Anderson*, 477 U.S. at 250.

It is no insult to the district judges of the nation to state that incautious or overzealous judges may on occasion venture across that boundary. In the heat of litigation, the mental agility needed to examine the evidence without adjudging the weight or credibility of documents and witnesses may turn brittle. Confidence that a jury would

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[4] In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const., amend VII.

resolve a factual issue in movant's favor can turn into conviction that no genuine dispute exists at all.

It must therefore be the responsibility of appellate tribunals to police the boundary between the functions of judge and jury with vigilance. Amici believe there is need for this Court to instruct the courts of appeals reviewing summary judgments to "examine the record de novo without relying on the lower courts' understanding," of the evidence. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962), to ensure that this powerful device does "not denigrate the role of the jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Justice Black, shortly after the Rules became effective, perceived that vigilant review by appellate courts would be critical to protecting the jury right:

> A verdict should be directed, if at all, only when, without weighing the credibility of the witnesses, there is in the evidence no room for honest difference of opinion over the factual issued in controversy. I shall continue to believe, that in all other cases a judge should, in obedience to the command of the Seventh Amendment, not interfere with the jury's function. Since this is a matter of high constitutional importance, appellate courts should be alert to insure the preservation of this constitutional right.

Galloway v. United States, 319 U.S. 372, 407 (1943)(Black, J., dissenting). The price of the lack of vigilance may well be "the 'gradual process of judicial erosion which . . . has slowly worn away a major portion of the essential guarantee of the Seventh Amendment.'" *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 339 (1979)(Rehnquist, J., dissenting), quoting Justice Black in *Galloway*, 319 U.S. at 397.

CONCLUSION

For the forgoing reasons, Amici urge this Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

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